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No. 957

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

JAMES FRED BAXA and CLYDE CHURCH,
Petitioners,

vs.

UNITED STATES OF AMERICA,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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REPLY MEMORANDUM FOR PETITIONERS

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May It Please The Court:

The government has candidly and commendably expressed agreement with our contention that the admission against petitioners of the sellers' confession was error.

For that reason, viewing that error alone as completely decisive of the case, the government has made no comment on our other contentions.

We would not be thought ungrateful for the candor and fairness with which the government has responded to our petition. Although we believe that there was a failure of proof, we welcome the prospect of a new trial in preference to petitioners' present plight. But if a retrial should be deemed appropriate, we are hopeful that such trial will be a completely fair one, avoiding the misapplication of the conspiracy doctrine which tainted the previous proceedings.

Within our original petition, we attempted to make the following points:

1. There was no competent evidence of petitioners' guilt.

2. This case exemplifies the current tendencies basically to misapply the conspiracy doctrine. The loose denunciation as a conspiracy of any crime involving more than one person, should be arrested—particularly because of the evidentiary consequences of the theory of vicarious liability.

3. Even within the conventional conspiracy framework, the result below was unwarranted. To instruct the jury that common design has been proved, is effectively to direct a verdict of guilty. And there is no possible justification for permitting the jury to consider against petitioners, the post-apprehension confession of the seller.

Summarily to grant a retrial on the basis of the wrongful admission of the sellers' confession, will merely delay the presentation of the other contentions in this court. For to order a re-trial might be considered an endorsement, *sub silentio,* of the sufficiency of the evidence. Also, it is quite possible that on retrial, petitioners will again be viewed as having conspired with the sellers by the mere

act of buying. The instruction that the government has proved common design has proved popular and thus might well be given again.[1] In those circumstances, both the basic misapplication of the doctrine of conspiracy and the erroneous procedure within the framework of conventional conspiracy doctrine, will have survived this court's reversal of petitioners' conviction.

Petitioners are understandably anxious that those issues be resolved in advance of a second trial. Such a determination might well render further proceedings unnecessary.

But it is the importance of the federal questions presented by the petition, and the constitutional dimensions of the problems generated by expansion of the doctrine of conspiracy, which impel our suggestion that the case warrants this Court's plenary consideration.

Accordingly, we suggest that the granting of the petition and the remandment for new trial should not be limited to the government's concession of error.

In closing, we would make clear our gratitude for the Solicitor General's response to our petition. Moving counsel, in their presentations for the defense, will be mindful of the example he has set.

Respectfully submitted,

MELVIN B. LEWIS and
HOWARD W. MINN
Attorneys for Petitioners

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[1] We are informed that three other petitions for certiorari based in part on the same instruction, are presently pending in this Court.